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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY RUNSER,

Defendant and Appellant.

B153559

(Super. Ct. No. NA047703)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Margaret M. Hay, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and Stephanie C. Brennan, Deputy Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

Appellant Ricky Runser challenges his conviction for possession of an assault weapon on grounds of prosecutorial misconduct and instructional error. We conclude the form of several questions by the prosecutor was improper, but did not amount to prejudicial misconduct. Any error in instructing the jury with CALJIC No. 2.62 was necessarily harmless. In accordance with *People v. Engelman* (2002) 28 Cal.4th 436), we reject appellant's contention that the trial court erred in instructing with CALJIC No. 17.41.1.

## BACKGROUND AND PROCEDURAL HISTORY

Long Beach Police Officer Donald Goodman and his partner stopped to investigate a truck parked the wrong way in front of appellant's house. Appellant's cousin, Gary Radford, emerged from the house, spoke to the officers, and invited them in. Appellant was not home at the time. In appellant's bedroom, the officers observed a pipe and a baggie that appeared to contain methamphetamine. They searched the bedroom and found an SKS assault-type rifle with a loaded detachable magazine, additional SKS magazines, and other guns. The officers arrested appellant when he returned home.

A jury convicted appellant of possessing an assault weapon, acquitted him of possessing a controlled substance with a firearm, and could not reach a verdict on a lesser included offense of possessing methamphetamine. The court granted appellant probation.

## DISCUSSION

### **1. The prosecutor did not engage in prejudicial misconduct.**

Officer Goodman testified that as he was taking appellant to the police station, appellant said everything they found at the house belonged to him, he was guilty, all the guns belonged to him, and he did not want Radford to be charged with anything. Appellant told Goodman he bought the SKS rifle from his girlfriend in 1992, when, he claimed, it was a legal weapon. He admitted knowing it was currently an illegal weapon because an off duty sheriff's deputy at a shooting range saw the gun and told him it was

illegal and he should get rid of it. Goodman testified appellant also admitted that he used methamphetamine to feel normal, and would go crazy if he stopped.

Appellant testified at trial. He denied telling Goodman he needed to use methamphetamine to feel normal. He admitted the SKS was his, but claimed his girlfriend purchased it, registered it, and gave it to him, along with the registration papers, for his birthday in 1992. He admitted telling Goodman that everything they found was his and he was guilty. On cross-examination, appellant said he did not know where the SKS registration papers were, and he admitted he had never registered it in his name. He denied knowing the SKS was illegal and denied telling Goodman that a sheriff's deputy at a shooting range told him it was an illegal weapon. The prosecutor asked, "So Officer Goodman is lying?" Appellant replied, "Yes." The prosecutor later returned to the same point, asking, "So you are saying Officer Goodman lied when you told him that the SKS was illegal or you knew that the SKS was illegal because a sheriff deputy told you while practicing at a shooting range that that gun itself was illegal?" Appellant replied, "No, it's just a stretch of the truth of what was really said." Appellant then explained he heard someone say "something similar to that," but was not sure whether it referred to his gun.

Appellant testified he kept the loaded magazine in a drawer, detached from the SKS rifle. The prosecutor asked, "So when Officer Kofoed testified that the magazine was actually in the receiving chamber of the SKS, was he lying?" Appellant replied that he did not think the magazine was attached to the rifle. The prosecutor asked, "So you are saying he's lying or he might be mistaken or that you might be wrong?" Appellant responded that either he or the officer might have been mistaken. The prosecutor also asked, "As far as Officer Goodman's testimony about what you told him, is it true that but for conversations about the methamphetamine and you keeping the SKS for protection that the rest of that is a lie?" Appellant replied, "The rest of that is a stretch of the truth, yes."

Citing federal case law, appellant contends the prosecutor engaged in prejudicial

misconduct by asking him whether the police officer witnesses lied while testifying. (See, e.g., *U. S. v. Sanchez* (9th Cir.1999) 176 F.3d 1214, 1219-1220.) He further contends defense counsel rendered ineffective assistance by failing to object to this alleged misconduct.

Although no published decision by a California court has prohibited “was he lying” questions, California courts have held that lay opinion about the veracity of particular statements by another is inadmissible. (*People v. Melton* (1988) 44 Cal.3d 713, 744; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40.) If a witness is not permitted to testify that another person told the truth on a particular occasion, it follows that a witness is also prohibited from testifying that another person lied on a particular occasion. Accordingly, appellant is correct that the prosecutor’s questions to appellant about whether Goodman and Kofoed lied were objectionable. That does not mean, however, that the prosecutor committed misconduct by asking those questions.

Conduct by a prosecutor that does not violate a ruling by the trial court is misconduct only if it amounts to the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury or is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Silva* (2001) 25 Cal.4th 345, 373.) The trial court had not ruled on the propriety of the line of questioning in controversy. The questions did not constitute a deceptive or reprehensible method of persuasion and were not egregious. The prosecutor asked only five “was he lying” questions, and two of them were virtually identical. Moreover, it was obvious from the remainder of appellant’s testimony that he disputed the veracity of the account given by the officers. When appellant denied that he made certain statements to which Goodman testified, he implicitly told the jury that Goodman’s testimony on those points was false. Although appellant did not say, “Goodman lied,” the effect was the same. The prosecutor’s “was he lying” questions did little more than point out the obvious.

Moreover, misconduct requires reversal only when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor not

engaged in misconduct. (*People v. Ochoa* (2001) 26 Cal.4th 398, 442.) Because the prosecutor's objectionable questions merely highlighted appellant's pre-existing challenge to the police officers' credibility, and because jurors in post-Rampart Los Angeles are unlikely to be shocked or offended by a defendant's contention that a police officer witness lied, there is no reasonable probability appellant would have obtained a more favorable verdict if the prosecutor had not asked the objectionable questions.

Furthermore, absent a showing that the harm could not have been cured, an appellant may not complain of prosecutorial misconduct unless he objected to the alleged misconduct in a timely fashion at trial and requested that the jury be admonished to disregard the impropriety. (*People v. Benson* (1990) 52 Cal.3d 754, 794.) The purported harm in this case would have been avoided completely if appellant had timely objected to the form of the "was he lying" questions. Consequently, he failed to preserve the issue for appellate review.

Appellant's attempt to circumvent this bar to review with his ineffective assistance claim is unavailing. Such a claim requires a showing of objectively unreasonable performance by counsel and a reasonable probability that, but for counsel's errors, appellant would have obtained a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) For the reasons discussed above, appellant cannot show that, but for defense counsel's failure to object to the "was he lying" questions, he would have obtained a more favorable verdict. Moreover, deciding whether to object to the admission of evidence or allegedly improper conduct by the prosecutor is inherently tactical, and counsel's failure to object will seldom establish ineffective assistance. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 502; *People v. Williams* (1997) 16 Cal.4th 153, 215.)

For all of these reasons, we reject appellant's contentions.

**2. If the trial court erred by instructing with CALJIC No. 2.62, the error was harmless.**

Appellant contends CALJIC No. 2.62<sup>1</sup>, which the trial court gave, was inapplicable because he explained or denied all of the prosecution evidence.

Assuming the trial court erred by giving this instruction, there is no possibility it affected the verdict. The instruction expressly told the jury it applies only if the jury found that the defendant had failed to explain or deny evidence that he could reasonably be expected to deny or explain because of facts within his knowledge. Thus, if appellant explained or denied all of the prosecution's evidence, the jury would necessarily find CALJIC No. 2.62 to be inapplicable. The jury was further instructed, under CALJIC No. 17.31, to disregard any instruction that applied to facts that the jury determined did not exist, and not to conclude from the giving of an instruction that the court was expressing an opinion as to the facts. Moreover, CALJIC No. 2.62 did not direct the jury to draw an adverse inference, and its final two paragraphs favored the defense.

The verdicts indicate the jury deliberated carefully, affording appellant the benefit of all reasonable doubt. If, as appellant contends, the instruction cast him in an unfavorable light, one would have expected the jury to convict him on the second count. It is not reasonably probable that appellant would have obtained a better result had the instruction not been given.

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<sup>1</sup> As given, CALJIC No. 2.62 provided as follows:

“In this case defendant has testified to certain matters.

“If you find that [a] defendant failed to explain or deny any evidence against [him] introduced by the prosecution which [he] can reasonably be expected to deny or explain because of facts within [his] knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable.

“The failure of a defendant to deny or explain evidence against [him] does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

“If a defendant does not have the knowledge that [he] would need to deny or to explain evidence against [him,] it would be unreasonable to draw an inference unfavorable to [him] because of [his] failure to deny or explain this evidence.”

**3. The trial court did not err by instructing with CALJIC No. 17.41.1.**

Appellant contends the trial court erred by instructing the jury with CALJIC No. 17.41.1. In *People v. Engelman* (2002) 28 Cal.4th 436, the California Supreme Court disapproved of CALJIC 17.41.1 and forbade trial courts giving it in future trials. (*Id.* at p. 449.) The Court expressed concern that the instruction created “a risk of unnecessary intrusion on the deliberative process.” (*Id.* at p. 441.) Nonetheless, the court concluded that giving the instruction did not infringe upon federal or state constitutional rights and was not error. (*Id.* at pp. 441, 449.)

As in *Engelman*, there was no indication the jury encountered any problems during deliberations. It did not deadlock or report that any juror refused to deliberate or follow the law. Neither did it request further instruction or ask a single question regarding when the weapon would be considered armed. In short, there was no indication that the potential risk created by CALJIC No. 17.41.1 was realized in this case. Accordingly, appellant’s claim has no merit.

**DISPOSITION**

The judgment is affirmed.

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BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.